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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/669,222	09/24/2003	Patrick E. Allen	6299US	2159

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EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	02/09/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/669,222

Applicant(s)

ALLEN ET AL.

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 04 January 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-50 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-50 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date. _____ | 6) <input type="checkbox"/> Other: _____ |

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1 and 38 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 1 and 38 are indefinite in the use of the phrase "high in both protein and fiber". It is not seen how the composition can be high in fiber if the amount of fiber reads on zero.

Claims 31-37 are indefinite in referring to "step A or step B", when there are no such steps in claim 30, i. e. there is a lack of antecedent basis for referring to Step a or step B.

Miscellaneous

A period should be at the end of claims 27 and 32.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-14, 17, 23, 27, 30, 50 are rejected under 35 U.S.C. 102(b) as being anticipated by Sander et al. (6,242,033).

Sander discloses as in claims 1, 10, an expanded cereal type product with a high protein content of from 60 to 70%, fiber, fat and starch in the claimed amount with a

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density of 0.13-0.38gms/cc. and a moisture content of less than 5% (col. 8, lines 60-67, col. 12, lines 1-10, lines 30-40). The product is seen to be high in fiber as amounts within the claimed range have been disclosed and the product is seen to have been soft and non-gritty, without a glassy texture as the composition has been shown.

Dry blends of soy protein isolate and a denatured soy protein concentrate can be used as in claim 2 (col. 4, lines 15-20).

The soy can be a protein concentrate and an isolate as in claims 3 and 4 (col. 2, lines 44-50).

The claimed weight ratio of whey protein isolate and soy protein isolate as in claim 5 is disclosed in col. 10, lines 50-61. The crush strength is seen to be inherent as the composition has been shown.

Inulin can be added as in claims 6 and 9 (col. 3, lines 20-25).

The product as in claim 7 can be free of soy protein as other proteins can be used ((col. 2, lines 44-50).

High potency sweeteners are disclosed in col. 13, lines 9-11 as in claim 8 and topical coatings as in claim 11.

Rice starch can be used as in claim 14 (col. 3, lines 15-20).

The limitations of claims 12, 13, 17, 23 have been disclosed above.

No additional fat is seen to be absorbed as in claim 23 (col. 4, lines 15-37, col. 8, lines 60-70).

O's as in claim 27 are disclosed in col. 9, lines 60-65.

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Sander discloses the use of a dough mass to be extruded using a twin screw extruder (claim 50) as in claim 30, with the claimed composition, which is extruded and dried (abstract and col. 2, lines 66-68, col. 3, lines 1-3, lines 40-45, col. 4, lines 15-36). The product is seen to be low in fat as above, soft and non-gritty without a glassy texture as the process has been shown above.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 15, 16, 18, 20, 22-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sander et al. (6,242,033).

Claim 15 further requires a piece count within a particular range. However, as the composition has been shown above, the piece count would have been within the

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claimed range. Therefore, it would have been obvious to arrive at the claimed piece count using the composition of Sanders.

Claim 16 further requires that the topical coating include particulates. Sander discloses adding sucrose syrup, flavor and antioxidants. Nothing new is seen in adding particulates, especially as no particular particulates are required. Sugar can even be in particulate form (col. 8, lines 10-25). Therefore, it would have been obvious to add particulates for their known function of adding nutrition to the composition.

Claim 18 further requires the use of particular amounts of cellulose, and claim 20 amounts of starch, claim 22, sugar contents of less than 5%, claim 24, particular amounts of salt. However, the reference discloses the use of dietary starches (col. 3, lines 22-25). Various amounts have been disclosed above and densities. It would have been within the skill of the ordinary worker to vary the amounts depending on the particular composition required. Nothing new is seen in the use of carboxymethyl cellulose instead of other fibers absent a showing of unexpected results using the claimed fiber. The use of soluble and insoluble fiber is well known. The reference discloses inulin and fructooligosaccharides (soluble fiber) and dietary fibers (insoluble fiber). Salt is an extremely well known additive and nothing new is seen in the use of salt for its known function. Therefore, it would have been obvious to vary the amounts of ingredients and densities and to use a particular fiber since Sanders discloses amounts densities and fibers within the claimed ranges.

Claim 25 further requires the use of oat bran and white wheat bran and claim 26 the use of egg powder or lecithin and claim 28 fruit particles and nut pieces. The reference discloses the use of betaglacans from oats and the use of dietary fiber (col. 3, lines 20-25). Bran is extremely well known as in "ALL BRAN" (Trademark). Nothing new is seen in using a particular type of fiber absent a showing of unexpected results. Also, egg and lecithin are common ingredients in processed foods as in claim 26. Attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients, which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Therefore, it would have been obvious to use various types of fibers for their known functions.

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Claim 29 is rejected under 35 U.S.C. 103(a) as being unpatentable over Sander '033 as applied to the above claims, and further in view of Evenson et al. (6,558,718).

Evenson discloses that it is known to add nutrient clusters to cereal (abstract). Therefore, it would have been obvious to add the nutrient clusters to the cereal of Sander for its known function of providing nutrition.

Claims 31-37, 42 —49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sanders as applied to the above claims, and further in view of Roush et al. (4,790,996).

Claim 31 further requires rotating the screw at a particular SME. Roush et al. discloses 20-40 watt hours per pound of feed which is seen to have been within the claimed range. Therefore, it would have been obvious to make a product having the claimed SME.

The dough exiting has had 150 torques, discharge pressure 180, temp. 260-262, and flaked at 500 psi and dried at 280 F. as in claim 32. The moisture content was 8-20% (col. 7, lines 15-20, lines 50-70, lines 8-12, lines 15-70). Therefore, it would have been obvious to treat as shown by Roush et al. in the process of Sanders who has incorporated by reference the process of Roush et al.

The further limitations as in claims 33-36 as to the extruder are seen as being within the skill of the ordinary worker to vary depending on the composition of the dough. Claim 34 further requires an extruder screw range of 600-800 RPM's. However, the reference to Sander discloses up to 510 RPM's. No patentable distinction is seen at this time between 600 and 510 rpm's absent unexpected results. Therefore,

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it would have been obvious to vary processing conditions as shown by Roush et al. in the process of Sander.

The limitations as to claims 37, 42-45 have been disclosed above. Nothing is seen that the extruder of Roush is not a high-speed twin extruder as shown by Roush et al. as in claim 46.

Nothing new is seen in toasting puffed pieces as in claim 47, or in applying a topical coating as in claim 48. Particulates have been discussed as in claim 49, and flavoring such would have been obvious in order to make the product appealing.

Allowable subject matter

Claims 19 and 21, 38-41 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

ARGUMENTS

Applicant's arguments filed 1-4-07 have been fully considered but they are not persuasive. Applicants argue that Sanders is not concerned with a high fiber, high protein composition. However, applicants claims 1 and 30 read on zero amounts of fiber, or small amounts of fiber at the lower end of the range.

Applicants argue that Sander teaches a product with a glassy appearance. However, in ex. 1, the reference goes on to disclose that the product was brittle and tended to shatter, and had too bland a flavor and could not survive further extrusion, drying and coating steps, i. e. this product was deemed unsuitable. Ex. 2 discloses a more suitable product.

Extruder RPM's of up to 510 are found in Sander (col. 10, lines 5-10). No patentable distinction is seen at this time between 510 and 600 RPM's.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for

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published applications may be obtained from either Private PAIR or Public PAIR.


Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should

you have questions on access to the Private PAIR system, contact the Electronic

Business Center (EBC) at 866-217-9197 (toll-free).

Hp 2-5-07


HELEN PRATT
PRIMARY EXAMINER